IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Seidel v. Telus Communications Inc.,*** 2008 BCSC 933

Date: 20080716
Docket: L050143
Registry: Vancouver

Between:

Michelle Seidel

Plaintiff

And:

Telus Communications Inc.

Defendant

Before: The Honourable Mr. Justice Masuhara

Reasons for Judgment

Counsel for the Applicant:	R. Anderson & S. Hern
Counsel for the Defendant:	B. Lemer & A. Grant
Date and Place of Trial:	May 30 and June 2, 2008. Vancouver, B.C.

I. Introduction

[1] Telus applies for a stay of this intended class action on the basis that two recent judgments of the Supreme Court of Canada, ***Dell Computer Corp. v. Union des Consommateurs***, 2007 SCC 34, [2007] 2 S.C.R. 801 and ***Rogers Wireless Inc. v. Muroff***, 2007 SCC 35, [2007] 2 S.C.R. 921, require a determination by an arbitrator of the applicability of an arbitration clause contained in the agreement between the parties prior to a certification hearing.

[2] Telus submits that ***Dell*** and ***Rogers*** have overtaken ***McKinnon v. Money Mart Co.***, 2004 BCCA 473, 50 B.C.L.R. (3d) 291 [***MacKinnon #2***], a decision of a five member panel of the court. In that case, the court found that s. 15 of the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55 [***CAA***] and s. 4 of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 [***CPA***] were in mutual conflict and held that it is the duty of the court to consider under s. 4 of the ***CPA*** whether a class action proceeding is the preferred method of resolving the parties' dispute having regard to all circumstances including the presence of an arbitration clause. If a class action proceeding is preferred

under s. 4 of the ***CPA***, then the arbitration agreement is rendered "inoperable" and the court should refuse to stay proceedings under s. 15 of the ***CPA***.

[3] Telus submits further that the subsequent ruling by Madam Justice Brown in ***McKinnon v. Money Mart Co***., 2008 BCSC 710 [***McKinnon #5***], where she held that ***Dell*** and ***Roger*** decisions were not applicable to this province's ***CAA*** and ***CPA*** because the Court in those decisions dealt solely with the law of Quebec, was based on findings of fact with respect to Quebec law which are not binding on this Court, and which are not supported in this application. In ***McKinnon #5***, Brown J. found that the relevant law of Quebec was significantly different than the law of this province. Specifically, she found at ¶36 that the purpose of the arbitration provisions in the Quebec law were to "displace judicial intervention" and to "oust the usual jurisdiction of the judiciary". In essence, she held that since ***Dell*** considered the interpretations of sections of the Quebec ***Code of Civil Procedure*** [**C.C.P.**] and not sections of B.C.'s ***CAA*** or ***CPA***, it had no bearing on ***MacKinnon #2***.

[4] In response, the plaintiff submits the following:

(1) ***Dell*** and ***Rogers*** decisions do not affect ***MacKinnon #2*** and therefore this Court is bound by ***MacKinnon #5***;

(2) the defendant is estopped by issue estoppel from bringing the instant motion on the basis that the defendant has already taken a substantive step in this action; and

(3) even if ***Dell*** and ***Rogers*** are found to be applicable,

(a) the reach of those decisions extends only to the period during which the arbitration provision was in existence, which means from 2003, when Ms. Seidel renewed her contract, onwards; and

(b) they do not preclude the plaintiff's action under the ***Business Practices Consumer Protection Act***, S.B.C. 2004, c. 2 [***BPCPA***], which invalidates any waiver of consumer rights given by this ***Act***.

II. Admissibility of Expert Evidence

[5] A preliminary issue raised at the outset of this hearing was the admissibility of expert evidence on the law of Quebec. This issue relates to the core of Telus' argument that the laws of Quebec and British Columbia are substantially similar and, as a result, ***Dell*** applies and necessarily displaces ***MacKinnon #2***.

[6] To establish the similarity, counsel for Telus obtained an opinion on the state of Quebec law relevant to this application from Chantal Chatelaine, an attorney-at-law who heads the class action litigation group at a Montreal law firm. In response, counsel for the putative representative plaintiff obtained an opinion from Michel Belanger, who is also an attorney-at-law in Quebec and whose practice is exclusively focused on class actions.

[7] The plaintiff objected to the admissibility of the opinions.

[8] For the following reasons, I am of the view that it is appropriate in a case such as this to receive expert evidence as to the state of the law in a foreign jurisdiction, including the state of the law in a different province.

[9] The plaintiff submits that expert evidence on Quebec law is unnecessary as this Court is qualified to consider Quebec law without additional help:

> Case law from other provinces (including Quebec), commonwealth countries and the United States is commonly referred to in argument in Canadian courts and counsel puts the case law in the context of statutory scheme from which it arises. The only exceptional circumstance in this case is that some Quebec decisions need translation. Once translated the court is capable of interpreting the civil law statutes. The same principle of statutory interpretation apply to civil and common law: *Epiciers Unis Metro-Richelieu Inc., division "Econogros" v. Collin,* 2004 SCC 59 ¶20-22.

[10] The plaintiff claims that "imposing any sort of requirement that argument has to be supplemented by expert evidence would open the floodgates and be unnecessary, expensive and time consuming." Moreover, the plaintiff submits that the affidavit of Ms. Chatelain "is unnecessary and is argument in the guise of expert evidence" and therefore is inadmissible.

[11] The defendant submits that foreign law, which includes law of other provinces, is always a question of fact and must be proven via expert evidence: Castel and Walker, *Canadian Conflict of Laws* (6th ed., 2007) at 7-1; ***Power Measurement Ltd. v. Ludlum****,* 2006 BCSC 157 ¶91, 33 C.P.C. (6th) 47; Dictionary of Canadian Law (3d ed., 2002); ***Pearson v. Boliden Ltd.***, 2002 BCCA 624, 7 B.C.L.R. (4th) 245 (C.A.). The defendant cites a number of cases where Quebec law was treated as foreign law and expert evidence was accepted or suggested by the court.

[12] The issue in this case is neither about imposing a requirement of expert evidence on foreign law, nor about the necessity of such evidence in every case where foreign law may be at issue. Rather, the issue is whether, following the well-established

principled approach to admissibility of expert evidence, such evidence on Quebec law should be admitted in this case.

[13] The leading case on the admissibility of expert evidence is ***R. v. Mohan***, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419, where the Court held that the question of admissibility falls within the exercise of judicial discretion having regard to the necessity and relevance of the expert evidence in the context of the particular case.

[14] Since neither the exclusionary rules nor the qualifications of TELUS's or plaintiff's experts are at issue on this application, the focus is on necessity and relevance: necessity being outside of my expertise as a trier of fact, and logical relevance to the issues on this application. The evidence is clearly relevant to the issue on this application; whether or not ***Dell*** can be distinguished as based on substantially different law than that of British Columbia. Thus, the only issue is necessity.

[15] In addition to the usual consideration whether this evidence is outside of my expertise and relevant to the issues at hand, the question of necessity of expert evidence on Quebec law is informed by three factors.

[16] First, as correctly suggested by Telus in its submissions, there is a common law imperative to receiving expert evidence on matters of foreign law. As explained by Finch J.A. (as he then was) in ***Old North State Brewing Co. v. Newlands Services Inc.*** (1998), 58 B.C.L.R. (3d) 144 ¶39, 23 C.P.C. (4th) 217 (C.A.):

> Foreign laws are questions of fact which must be proven by evidence of persons who are experts in that law: see *Allen v. Hay* (1922), 64 S.C.R. 76 (S.C.C.) at 80-81; and Castel's *Conflicts of Law* 4th ed., 1997 at 155-56.

[17] Second, since the relevant law of Quebec is statutory (as for that matter is all Quebec's private law under its civil system), s. 24(2)(e) of the ***Evidence Act,*** R.S.B.C. 1996, c. 124 [***EA***] dictates that I must take judicial notice of it:

> (2) Judicial notice must be taken of all of the … (e) Acts and ordinances of the Legislature of … province … of Her Majesty;
>
> [emphasis added]

[18] Where a court takes judicial notice of a fact or a matter, it is "by definition, not open to rebuttal" and "the judicial notice is final": ***R. v. Spence***, 2005 SCC 71 ¶55, [2005] 3 S.C.R. 458. However, as noted by Madam Justice Martinson in ***Pitre v. Nguyen***, 2007 BCSC 1161 ¶18, this judicial notice provision (as well as s. 17 of the ***Evidence Act***, R.S.C. 1985, c. C-5) is an exception to the rule that "foreign law is, generally, a factual matter which must be proven by the testimony of a properly qualified expert."

[19] Third, there is no burden of proof on the plaintiff to adduce evidence of foreign law: ***Old North***, ¶39. When foreign law is at issue but has not been proven at all or to the court's satisfaction, the court is entitled to assume that it is the same as *lex fori*: ***RDA Film Distribution Inc. v. British Columbia Trade Development Corp.***, [1999] B.C.J. No. 1516 ¶201 (S.C.), rev'd on other grounds 2000 BCCA 674, 83 B.C.L.R. (3d) 302.

[20] At first glance, these factors present an inherent conflict. On the one hand, the court should accept expert evidence of foreign law and can only fall back on the presumption of similarity if no evidence or insufficient evidence is adduced. On the other hand, the court must take judicial notice of Quebec law, which would mean that further evidence on it (expert or otherwise) would be inadmissible as any fact or matter

judicially noticed attains the status of an indisputable fact. Again at first glance, the decision of Martinson J. in ***Pitre*** appears to provide a resolution to this conflict: s. 24(2) of the ***EA*** is an exception to the general rule regarding admissibility of evidence of foreign law; it displaces the common law requirement of proving the foreign law as a question of fact. However, this conclusion is not a complete answer.

[21] In the first place, such a conclusion goes against the grain of numerous cases where expert evidence on the law of Quebec was admitted or at least requested. The following cases were cited by Telus: ***Maheu v. American Reserve Mining Corp.***, [1988] B.C.J. No. 2017 (S.C.); ***ABN Amro Bank N. V. v. BCE Inc.*** (2003), 44 C.B.R. (4th) 1 (Ont. S.C.J.); ***Schaub v. Schaub***, (1984), 51 B.C.L.R. 1 (S.C.). Moreover, this conclusion presupposes that s. 24(2) of the ***EA*** automatically vests the judge with the power and capacity to interpret and ascertain the true effect of the enactments of any commonwealth jurisdiction, irrespective of their language or the legal tradition or system under which they were enacted.

[22] The answer lies in the conclusion that there is a difference between taking judicial notice of the fact that a statute exists and its *prima facie* content, and ascertaining the true meaning and effect of that statute. The former is intended by s. 24(2) of the ***EA*** (as well as s. 17 of the ***CEA***) for the sake of judicial expediency to avoid formal introduction of unnecessary and irrelevant evidence. Where a law is enacted and officially published, a court's time would be wasted in requiring the parties to adduce the evidence of such law and then allowing a cross-examination on this evidence.

[23] However, the law is more than just the text of the statute. This is a trite principle of law in the common law jurisdictions as statutes are interpreted and augmented by precedent. However, despite the common adage that all law in civil law jurisdictions is codified, civil law is also more than just the *Civil Code*. The following passage from John E.C. Brierly & Roderick A. Macdonald, eds. *Quebec Civil Law: An Introduction to Quebec Private Law"* (Edmond Montgomery Publications Limited: Toronto, Canada) at 1 is instructive:

> In such a context, the presence of a Civil Code has, without doubt, been of crucial importance to the survival and development of the Civil law tradition. The analysis of its contents, quite naturally, therefore, has a prominent place in the exposition offered here. But it would be an error to suppose, as is often the case, that all the Civil law is contained in that enactment. It has, after all, existed for no more than 127 years and would have been impossible without the developments occurring in the several millennia that preceded it. The Code supposes, at the same time, a vision of the use of auxiliary sources that has enabled it to adapt to changing social circumstances since 1866.
>
> It is thus a special burden of this study to demonstrate how the Code itself is no more than an element — albeit a leading element — in the operation of the scheme of legal ordering it appears to typify. Such a perspective is all the more important at the present time as Quebec readies itself, at the close of the twentieth century, to put in place a major re-statement of the Civil law in those sectors in which the Code gives it expression.
>
> [emphasis added]

[24] It would be audacious of me to conclude that simply because I can read the translations of the provisions of the *Civil Code* I have the capacity to fully understand and interpret the meaning of such provisions. In other words, this is information that is "outside of the experience the trier of fact", which makes expert evidence necessary.

[25] I note that a good illustration of the necessity of expert evidence in this case was the error in the plaintiff's initial submissions regarding the status of the ***Code of Civil Procedure*** within the Quebec's *Civil Code*. Only after the opinion of Ms. Chatelaine was obtained did plaintiff's counsel withdraw from his stated position.

[26] Accordingly, the expert evidence of Ms. Chatelain and Mr. Belanger is admissible in this application.

III. Issues

[27] Based on the parties' submissions, the following issues are addressed:

(1) What is the effect of ***Dell*** and ***Rogers*** on ***MacKinnon #5*** and ***MacKinnon #2***, and, in accordance with that effect, if any, should these proceedings be stayed and the matter referred to arbitration?

(2) Does s. 3 of the ***BPCPA*** preclude the application of the arbitration clause in this case staying the proceedings.

IV. Application of *Dell* and *Rogers* to British Columbia Law

[28] Because the ***Rogers*** decision was issued contemporaneously with ***Dell*** and simply applied the rules set out in the latter, throughout these Reasons I will only refer to ***Dell***.

[29] Addressing the issue of the effect of ***Dell*** on the law of British Columbia, and specifically on the rules elucidated by the five-member panel of our Court of Appeal in ***McKinnon #2***, two possible outcomes are evident.

[30] First, as held by Brown J. in ***McKinnon #5***, ***Dell*** may be Quebec-specific such that the significant differences between Quebec and British Columbia law preclude its application in this province. In this case, this Court is bound to follow ***McKinnon #2*** and, if it is decided that certification of this action is appropriate under s. 4 of the ***CPA***, I am bound to refuse TELUS's stay until the certification application is heard and decision issued as a certification would render the arbitration agreement between the plaintiff and Telus "inoperative" under s. 15 of the ***CAA***.

[31] Second, if ***Dell*** is applicable to the law of British Columbia, either because the law of Quebec is sufficiently similar to the law of this province, or because the case has Canada-wide application, this Court must determine the actual effect of ***Dell*** on TELUS's application. In other words, this Court must determine whether ***Dell*** requires a stay to be granted and this particular matter to be referred to an arbitrator for a decision regarding the applicability of the arbitration clause.

[32] I will address each of these scenarios below.

A. Is *Dell* Applicable in B.C.?

[33] In essence, Telus and the plaintiff disagree on whether the laws of the two provinces are sufficiently similar to extend the apparently Quebec-specific conclusions reached in ***Dell*** to the law of British Columbia and by necessary implication overturn ***McKinnon #2***. Although Brown J. has rejected this conclusion in ***McKinnon #5***, Telus submits that this Court is not bound by her conclusion for two reasons. First, it submits that Madam Justice Brown's conclusion is a finding of fact which is not binding on non-parties to the proceeding in which it was made: ***Halsbury's Law of England,*** 4th

Edition, ¶575; ***Lazard v. Midland Bank***, [1932] All E.R. 571 (H.L.); and ***Pacific Press v. Attorney General (British Columbia)***, 2000 BCSC 248, 73 B.C.L.R. (3d) 264 (S.C.). Second, it submits that those findings of fact were made on the basis of evidence which was incorrect and which is disputed in this application.

[34] Although I am not persuaded that I cannot heed to the findings of fact with respect to foreign law made by a fellow judge, I do not need to decide this issue here as I will analyze the issue of applicability of ***Dell*** anew in these Reasons and will consider the expert evidence on Quebec law adduced by the parties.

1. Class Action Proceedings Provisions

[35] The provisions of both provinces' class action legislation are sufficiently similar to discount the plaintiff's argument that they give rise to fundamentally different considerations.

[36] Section 4 of the ***CPA*** provides that a court must certify a class action proceeding if all of the requirements of this section are met:

> **4**(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> >
> > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> >
> > (d) whether other means of resolving the claims are less practical or less efficient;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[37] Notwithstanding the use of the prescriptive “must” in s-s. (1), certification is in fact a discretionary order based on the judge’s evaluation of the broad requirements contained in s-ss. (1) and (2): ***Samos Investments Inc. v. Pattison***, 2003 BCCA 87 ¶47, 10 B.C.L.R. (4th) 234; ***Harrington v. Dow Corning Corp.***, 2000 BCCA 605 ¶9-10, 82 B.C.L.R. (3d) 1; ***Campbell v. Flexwatt Corp.*** (1997), 44 B.C.L.R. (3d) 343 ¶25, [1998] 6 W.W.R. 275 (C.A.). Requirements that are particularly notable in the instant

context are found in s-ss. (1)(d) and (2)(d), where “other means of resolving the claims” necessarily include arbitration proceedings: ***McKinnon #2***, ¶28.

[38] The Quebec counterpart to the above provision is Art. 1003 **C.C.P.**, which provides:

> 1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> > *(a)* the recourses of the members raise identical, similar or related questions of law or fact;
> >
> > *(b)* the facts alleged seem to justify the conclusions sought;
> >
> > *(c)* the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
> >
> > *(d)* the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[39] As explained in Ms. Chatelain's report, Art. 1003 **C.C.P.** provides for a similar exercise of judicial discretion as does s. 4 of the ***CPA***:

> As stated in our opinion of November 12, 2007, the Québec Court of Appeal has clearly and unequivocally established the law of Quebec in this respect. Indeed, it is true that if, after going through the analysis required by article 1003 C.C.P., the trial judge concludes that the motion for authorization of a class action meets those requirements, then the trial judge does not have the discretion to deny the authorization sought. However, and very importantly, there is no doubt in Québec law that in determining whether the criteria are met, the authorization judge exercises discretionary power. [*Nadon v. Ville d’Anjou*, [1994] R.J.Q. 1823, at p. 1827 et s. (CA.) …; *Bouchard v. Agropur*, 2006 QCCA 1342 (Q.C.A.) …].
>
> Indeed, the Québec Court of Appeal specifically stated in *Agropur* that the Court must use its discretion in every case to establish whether it is appropriate to proceed by way of a class action. [*Agropur,* at para. 39]
>
> The Court of Appeal also referred to the importance of the judge’s role at the authorization stage by recognizing that he or she has the discretionary power to deny access to a class action despite fulfilling the main

> requirements. [*Agropur*, at para. 40 and referring to *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, at pp. 555-556.]
>
> Finally, the Court of Appeal held that in Québec the legislature has established guidelines, and that it is when each of the criteria is examined rather than when the court determines whether or not to grant the authorization, that the legislature chose to provide the judge with this discretion. [*Agropur,* at para. 41]
>
> It is widely accepted by the Québec courts that article 1003 C.C.P. requires the judge to use his or her discretion. Moreover, this discretion deserves deference and only allows for the intervention of the Court of Appeal when it is manifestly ill-founded or when the underlying analysis is flawed due to an error of law. In that respect we also refer to the recent Court of Appeal decision of *Harmegnies v. Toyota Canada* in which the Court of Appeal refers with approval to an article of the undersigned. [*Harmegnies v. Toyota Canada Inc.*, 2008 QCCA 380 (Q.C.A.), at para. 25 …]
>
> This flexibility is also imperative considering that the authorization stage notably allows the court to dismiss frivolous or simply inappropriate lawsuits.
>
> [Emphasis added]

[40] Moreover, Ms. Chatelain has also explained that the concept of “preferability” of a class proceeding is integrated into the judicial discretion under Art. 1003 **C.C.P.**:

> **(3) What is the concept of proportionality and how does it relate, if at all, to the concept of “preferability”?”**
>
> …
>
> With respect to question (3), in our opinion of November 12, 2007, we had stated that:
>
> > “the authorization judge must indeed consider whether a class action is the “preferable” way of disposing of the proposed recourses in his or her appreciation of the applicable criteria for determining whether a class action should be authorized or not”.
> >
> > “the appreciation of whether or not the relevant criteria of article 1003 C.C.P. have been met, includes consideration of such issues as whether the ends of justice will be met and the class action scheme is being used in a manner consistent with its intended use.”

> "The courts have, as a rule, simply factored that consideration into the criteria of 1003 C.C.P although it appears nowhere in the article in name The confirmation of the proportionality requirement at article 4.2 of the C.C.P. further emphasized and in effect crystallized that fact."
>
> "Consequently, although the C.C.P. does not state in express terms that one of the criteria to be met for the authorization of a class action is "preferability" the accepted view is, and we share that view, that the preferability condition is incorporated in or factored into the criteria specifically mentioned at article 1003 of the C.C.P. as part of the overall appreciation to be made by the authorization judge, including the consideration of article 4.2 of our C.C.P."

In answering question (3), Mr. Bélanger [plaintiff's expert on Quebec law] is of the opinion that the condition of preferability is not "formally incorporated in Québec law and does not constitute one of the conditions that must be met in order for a proceeding to be certified as a class action."

However, in answering question (3), Mr. Belanger admits that Québec case law does question whether class action is the preferable way of proceeding (p. 4). He adds that there are two trends in Québec, and that the concept of preferability is used on a case-by-case basis and not systematically (p. 5). He also concedes that Québec case law alludes to article 4.2 C.C.P indicating that this provision may render the "preferability" requirement applicable (p. 6).

We respectfully believe that Mr. Bélanger is reducing the strength and extent of this "trend" to which he alludes. Indeed, there is no opposing trend, but simply cases where the courts do not see fit to specifically mention whether the proposed class action is preferable or not, because, as stated in our opinion, this factor is simply incorporated or factored into the criteria specifically mentioned at article 1003 C.C.P.

Mr. Belanger has not referred to any case law stating that the preferability requirement should not be considered.

[41] Thus, there is no fundamental difference with respect to certification of class action proceedings between s. 4 of the ***CPA*** and Art. 1003 **C.C.P.**

2. Arbitration Provisions

a) British Columbia

[42] Section 15 of the ***CAA*** provides that a court, in the face of an arbitration agreement, must grant a stay of court proceedings unless it determines that the arbitration agreement falls under one of three prescribed exceptions:

> **15**
>
> (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
>
> [Emphasis added]

[43] The plain language of the provision indicates that the court has the jurisdiction to determine whether there is a problem with the arbitration agreement such that it is void, inoperative or incapable of being performed. In ***McKinnon #2***, a five-member panel of our Court of Appeal considered the meaning of “inoperative” and held that an arbitration agreement becomes inoperative when a court finds that a class action proceeding is preferable and certifies it accordingly under s. 4 of the ***CPA***. At ¶15, the court summarized:

> … analytically, the arbitration agreement can only be "inoperative" if the class proceeding is in fact certified, because it is the "preferable procedure" and has met the other requirements for certification.
>
> [Emphasis in the original]

[44] To arrive at this conclusion, the court analyzed the inherent conflict between s. 4 of the ***CPA*** and s. 15 of the ***CAA*** "in the context of their schemes and underlying policies": ¶20 and 22-24. Focusing on the word "inoperative" in s. 15 of the ***CAA***, the court found at ¶34-36 that although it has been previously considered and ascribed a narrow meaning, it has not been previously considered in the context of s. 4 of the ***CPA***:

> 34 The cases that have considered the meaning of "inoperative" in the context of s. 15(2) of the *Commercial Arbitration Act* make it clear that matters such as inconvenience, multiple parties, intertwining of issues with disputes which will not be arbitrated, possible increased cost and potential delay do not render an arbitration agreement "inoperative" (see *Prince George (City)* at para. 37, *Kaverit Steel and Crane Ltd.* at para. 48). Courts have found that arbitration agreements do not conflict with builders lien legislation and have not found arbitration agreements "inoperative" but have granted stays of builders lien actions: see *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 66 B.C.L.R. (2d) 225 (S.C.); *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.); *BWV investments Ltd. v. Saskferco Products Inc.* (1994), 119 D.L.R. (4th) 577 (Sask. C.A.).
>
> 35 In *Prince George (City)*, Cumming J.A. in his reasons for the Court cited M.J. Mustill & S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989) at 464-465) and J.B. Casey, *International and Domestic Commercial Arbitration*, looseleaf (Scarborough: Carswell, 1993) at 4-14, for their interpretations of the meaning of "inoperative". Both authors suggest that it describes an agreement that, in law, has ceased to have effect for the future or is for some reason no longer enforceable. Some of the reasons given are frustration, discharge by breach or subsequent agreement of the parties, or a declaration by a court.
>
> 36 Thus, the court's jurisdiction to refuse a stay of an action in favour of arbitration is limited. The approach of the courts has been deferential to arbitration agreements in the interests of freedom of contract, international comity and expected efficiency and cost-savings. "Inoperative" has been

> given a narrow interpretation in the context of commercial arbitration agreements. None of the authorities which have considered the meaning of "inoperative", however, has done so in the context of a class proceeding.
>
> [Emphasis added]

[45] The court found neither Ontario nor U.S. precedents helpful in analyzing the issue as the respective tests for granting a stay or refusing a referral to arbitration did not consider whether the arbitration agreement is "inoperative". However, given the statutory imperative for certifying a class action proceeding when the requirements of s. 4 of the ***CPA*** are met, including the court's necessary conclusion that the class action proceeding is preferable over arbitration as the "other means for resolving the claims", the court, at ¶48-49, upheld Brown J.'s decision that once a proceeding is certified, the arbitration clause becomes inoperative. Commenting on the sequence of events, the court concluded at ¶52-53:

> 52 It is only when the court has completed its analysis of the certification application and determines that it must certify the proceeding as a class proceeding that it can legally conclude that the arbitration agreement is "inoperative". It is inoperative because the court, following the direction of the Legislature, has determined that the class proceeding is the "preferable procedure" and the other requirements for certification have been met.
>
> 53 Thus, the applications for a stay and for certification of the class proceeding must be dealt with together. The outcomes of the two applications are interdependent: the mandatory terms of the *Class Proceedings Act* mean that arbitration and class proceedings cannot operate at the same time with respect to the same dispute. On the other hand, if the proceeding is not certified as a class proceeding, there may be no basis for saying that the arbitration agreement is "inoperative".
>
> [Emphasis added]

[46] Notably, ***McKinnon #2*** has been cited with apparent approval in several subsequent decisions of the British Columbia Court of Appeal: ***Ruddell v. BC Rail Ltd.***, 2007 BCCA 269 ¶31, 66 B.C.L.R. (4th) 385; ***Lieberman v. Business Development Bank of Canada***, 2005 BCCA 268 ¶10-11 (Chambers); ***Ezer v. Yorkton Securities Inc.***, 2005 BCCA 22 ¶17-18.

b) Quebec

[47] In Quebec, a comparable provision dealing with the interplay between arbitration and court proceedings is found in Art. 940.1 **C.P.P**:

> **940.1.** Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.
>
> The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.
>
> [Emphasis added]

[48] While Art. 940.1 also provides for an exception from a referral to arbitration (and thus a stay of the court proceedings), this exception appears to be much narrower, being limited to a situation when the arbitration agreement is null.

[49] As indicated by the plain language of the provision, and confirmed by Ms. Chatelain, the court retains the jurisdiction to determine whether the arbitration clause is null. However, this conclusion must be juxtaposed to an arbitrator's authority to decide the question of his or her own competence under Art. 943 **C.P.P.**, which provides:

> **943.** The arbitrators may decide the matter of their own competence.

[50] This interrelationship between the court's and arbitrator's jurisdiction was explained by Ms. Chatelain as follows:

> This must be understood in conjunction with the competence-competence principle giving the arbitrator competence to determine his or her own competence, but also the Court's powers to review that decision (see below);
>
> …
>
> The arbitrator's decision as to his or her own competence pursuant to article 943 COP can be appealed to the Court (COP 943.1). The Court's decision in this regard is final and without appeal (COP 943.2);
>
> …
>
> Thus, where the Court is said not to have "jurisdiction", this is in reference to that portion of an arbitration that is properly within the arbitrator's competence.

[51] The statutory scheme of Arts. 940.1 and 1003 **C.P.P.** and the proper place of arbitration within Quebec's civil justice system was considered by the Supreme Court of Canada in ***Dell***:

> 2 This appeal relates to the debate over the place of arbitration in Quebec's civil justice system. More specifically, the Court is asked to consider the validity and applicability of an arbitration agreement in the context of a domestic legal dispute under the rules of Quebec law and international law, and to determine whether the arbitrator or a court of law should rule first on these issues.
>
> [Emphasis added]

[52] As Madam Justice Deschamps noted at ¶38 and 41, Quebec's arbitration law is based on the New York Convention, *infra,* and the Model Law, *infra*, derived from it:

> 38 International arbitration law is strongly influenced by two texts drafted under the auspices of the United Nations: the ***Convention on the Recognition and Enforcement of Foreign Arbitral Awards***, 330 U.N.T.S. 3 ("**New York Convention**"), and the ***UNCITRAL* Model Law *on International Commercial Arbitration***, U.N. Doc. A/40/17 (1985) ("**Model Law**").
>
> …
>
> 41 The final text of the Model Law was adopted on June 21, 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). In its explanatory note on the Model Law, the UNCITRAL Secretariat states that it:
>
> > reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. (Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, at para. 2)
>
> In 1986, Parliament enacted the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), which was based on the Model Law. The Quebec legislature followed suit that same year and incorporated the Model Law into its legislation. Quebec's Minister of Justice at the time, Herbert Marx, reiterated the above-quoted comment by the UNCITRAL Secretariat: National Assembly, *Journal des débats*, 1st Sess., 33rd Leg., June 16, 1986, at p. 2975, and Oct. 30, 1986, at p. 3672.
>
> [Emphasis added]

[53] As the Court explained at ¶44-46, while incorporating the principles of the New York Convention and the Model Law, Quebec's implementation did not copy them, but rather was "inspired" by these documents, and established their roles as formal sources for interpretation:

> 44 Although Bill 91 was the Quebec legislature's response to Canada's accession to the New York Convention and to UNCITRAL's adoption of the Model Law, it is not identical to those two instruments. As the Quebec Minister of Justice noted, Bill 91 was [TRANSLATION] "inspired" by the Model Law and [TRANSLATION] "implement[ed]" the New York Convention: *Journal des débats*, 1st Sess., 33rd Leg., October 30, 1986, at p. 3672. For this reason, it is important to consider the interplay

> between Quebec's domestic law and private international law before interpreting the provisions of Bill 91.
>
> 45 This Court analysed the interplay between the New York Convention and Bill 91 in *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46 (S.C.C.), at paras. 39 *et seq*. After noting that there is a recognized presumption of conformity with international law, the Court mentioned that Bill 91 "incorporate[s] the principles of the *New York Convention*" and concluded that the Convention is a formal source for interpreting the provisions of Quebec law governing the enforcement of arbitration agreements: para. 41. This conclusion is confirmed by art. 948, para. 2 C.C.P., which provides that the interpretation of Title II on the recognition and execution of arbitration awards made outside Quebec (arts. 948 to 951.2 C.C.P.) "shall take into account, where applicable, the [New York] Convention".
>
> 46 The same is not true of the Model Law. Unlike an instrument of conventional international law, the Model Law is a non-binding document that the United National General Assembly has recommended that states take into consideration. Thus, Canada has made no commitment to the international community to implement the Model Law as it did in the case of the New York Convention. Nevertheless, art. 940.6 C.C.P. attaches considerable interpretive weight to the Model Law in international arbitration cases.
>
> [Emphasis added]

[54] With respect to Arts. 940.1 and 943 C.P.P., the Court noted at ¶80 that they contain the “essence” and “principle” of the relevant New York Convention and Model Law provisions:

> 80 It should be noted from the outset that art. 940.1 C.C.P. incorporates the essence of art. II(3) of the New York Convention and of its counterpart in the Model Law, art. 8. Furthermore, art. 943 C.C.P. confers on arbitrators the competence to rule on their own jurisdiction. This article clearly indicates acceptance of the competence-competence principle incorporated into art. 16 of the Model Law.

[55] Examining these international documents, the difference between the Quebec implementation and the original provisions is easy to discern. First, with respect to the

rule of referral to arbitration, Art. II(3) of the New York Convention and Art. 8 of the Model Law provide a much broader set of exceptions to the rule than Art. 940.1 **C.C.P.**:

> [the New York Convention]
>
> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> [the Model Law]
>
> *Article 8. Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> [Emphasis added]

[56] While the highly concentrated "essence" of these provisions may be that the right to arbitration is not absolute, it does appear that a court's power under Art. 940.1 **C.C.P.** to refuse a referral on the grounds that an arbitration agreement is "null" is materially narrower than the court's power to refuse a referral on the grounds that "the agreement is null and void, inoperative or incapable of being performed." As correctly pointed out by the defendant, s. 15 of the ***C.A.A.*** is in fact much closer to the above quoted international documents than Art. 940.1 **C.P.P.**

[57] Similarly, Art. 943 **C.C.P.**, which simply provides that "[t]he arbitrators may decide the matter of their own competence", is a much-abbreviated version Art. 16(1) of the Model Law:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> [Emphasis added]

[58] Notably absent from Art. 943 **C.C.P.** is the explanatory note found in Art. 16(1) of the Model Law that a competence decision includes a ruling on the "existence or validity of the arbitration agreement" and the question of whether the "contract is null and void". Correlation of this explanatory note with the language contained in Art. 8 of the Model Law indicates that it likely refers to the exception from the referral to arbitration when the arbitration agreement is "null and void", i.e., invalid. Notably, Art. 16(1) does not indicate that an arbitrator can find, as part of deciding his or her own competence, that an arbitration agreement is inoperative or incapable of being performed.

[59] Recognizing that Art. 940.1 **C.C.P.** appears to be much narrower than Art. II(2) of the New York Convention, but that it must be interpreted under the auspices of that international document, the Court in ***Dell*** found at ¶83-85 and 87 that it should not be read literally, but rather that a general rule – "the Quebec test" - should be derived from it in accordance with existing Quebec case law and Art. 943 **C.P.P.**:

> 83 Article 940.1 C.C.P. refers only to cases where the arbitration agreement is null. However, since this provision was adopted in the context of the implementation of the New York Convention (the words of which, in art. II (3), are "null and void, inoperative or incapable of being performed"), I do not consider a literal interpretation to be appropriate. It is possible to develop, in a manner consistent with the empirical data from the Quebec case law, a test for reviewing an application to refer a dispute

> to arbitration that is faithful to art. 943 C.C.P. and to the *prima facie* analysis test that is increasingly gaining acceptance around the world.
>
> 84 First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
>
> 85 If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
>
> …
>
> 87 Thus, the general rule of the Quebec test is consistent with the competence-competence principle set out in art. 16 of the Model Law, which has been incorporated into art. 943 C.C.P. As for the exception under which a court may rule first on questions of law relating to the arbitrator's jurisdiction, this power is provided for in art. 940.1 C.C.P., which in fact recognizes that a court can itself find that the agreement is null rather than referring this issue to arbitration.
>
> [Emphasis added]

[60] Thus, the Court drafted “the Quebec test” for interpreting the arbitration provisions found in Arts. 940.1 and 943 **C.C.P.** While the Court did briefly note at ¶82 the approach of the common law provinces to applicability of arbitration clauses, it

expressly developed the Quebec test "in a manner consistent with the empirical data from the Quebec case law …. faithful to art. 943 **C.C.P.**" (¶83).

3. Distinction between Quebec and B.C. Legislation

[61] As discussed above, the arbitration provisions of the Quebec ***Code of Civil Procedure*** were expressly based on the New York Convention and the Model Law. They were inspired by these international documents and incorporated their essence and principles. In British Columbia, the same could be said about the ***International Commercial Arbitration Act,*** R.S.B.C. 1996, c. 233 [***ICAA***], the preamble to which and s. 6 plainly indicate that it was enacted to implement the New York Convention as well as the Model Law and must be interpreted in accordance with these international documents:

> AND WHEREAS disputes in international commercial agreements are often resolved by means of arbitration;
>
> AND WHEREAS British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations;
>
> AND WHEREAS there are divergent views in the international commercial and legal communities respecting the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations;
>
> AND WHEREAS the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects a consensus of views on the conduct of, and degree and nature of judicial intervention in, international commercial arbitrations;
>
> …
>
> **6** ***Construction of Act***
>
> In construing a provision of this Act, a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCITRAL

> Model Arbitration Law and must give those documents the weight that is appropriate in the circumstances.

[62] Sections 8(1) and (2) of the ***ICAA*** incorporate the referral provisions, including exceptions for when the agreement is found to be null and void, inoperative or incapable of being performed, and s. 16(1) incorporates Art. 16(1) of the Model Law with respect to the arbitrator's power to rule or his or her own jurisdiction:

> **8** ***Stay of legal proceedings***
>
> (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> …
>
> ***16*** ***Competence of arbitral tribunal to rule on its jurisdiction***
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
>
> (a) an arbitration clause which forms part of a contract must be treated as an agreement independent of the other terms of the contract, and
>
> (b) a decision by the arbitral tribunal that the contract is null and void must not entail ipso jure the invalidity of the arbitration clause.

[63] In contrast to the ***ICAA***, the ***CAA*** does not contain any indications that it was legislated under the auspices of the New York Convention or the Model Law. Rather, it

is a statute enacted for the purpose of governing domestic arbitration and specifically excludes arbitration agreements which fall under the scope of the ***ICAA***:

> ***Definitions***
>
> **1** In this Act:
>
> **"arbitration agreement"** means a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the *International Commercial Arbitration Act* applies;
>
> [Emphasis added]

[64] Moreover, while s. 22 of the ***CAA*** envisions that arbitrations thereunder will benefit from the arbitration rules established by the International Commercial Arbitration Centre, it also expressly provides that in case of inconsistency between the provisions of the ***CAA*** and these rules, the former hold supreme:

> **22 International Commercial Arbitration Centre rules**
>
> (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.
>
> (2) If the rules referred to in subsection (1) are inconsistent with or contrary to the provisions in an enactment governing an arbitration to which this Act applies, the provisions of that enactment prevail.
>
> (3) If the rules referred to in subsection (1) are inconsistent with or contrary to this Act, this Act prevails.
>
> [Emphasis added]

[65] Sections 15(1) and (2) of the ***CAA***, dealing with a stay of court proceedings, are virtually identical to ss. 8(1) and (2) of the ***ICAA***. However, the similarities between the statutes end there. The ***CAA*** does not contain an equivalent to s. 16 of the ***ICAA*** or for

that matter any provisions dealing with the power of an arbitrator to decide his own jurisdiction. The ***CAA*** does not contain any indication that it was enacted pursuant to or inspired by any international documents. Whereas the arbitration provisions of the ***Code of Civil Procedure*** and the ***ICAA*** were specifically enacted pursuant to international obligations, and are interpreted in accordance with these obligations and guiding documents, the ***CAA*** represents an intra-provincial approach to commercial arbitration.

[66] As was also recently noted by Perell J. in ***Smith Estate v. National Money Mart Company***, 2008 CarswellOnt 3310 ¶257 (S.C.J.), issued while this decision was on reserve, the difference between the two arbitration regimes is further reinforced by the fundamentally different approach to the nature of arbitration agreements. Under Art. 2638 of the ***Civil Code of Quebec*** [**C.C.Q.]**, an arbitration agreement is defined as "a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts." Such a legislative endeavor to expressly oust the jurisdiction of the court is absent from the ***CAA***, where an arbitration agreement is defined as simply "an agreement between 2 or more persons to submit present or future disputes between them to arbitration…" As Perell J. noted at ¶257:

> … in any event, as a matter of doctrine, whatever the situation may be in *Québec* under the C.C.Q., the court's jurisdiction in Ontario is not ousted by the presence of an arbitration agreement, but rather the court's jurisdiction is governed by its own jurisdiction and by s. 7 of the *Arbitration Act, 1991,* as I have discussed above.

[67] This statement applies with equal strength to British Columbia.

[68] Parenthetically, I also note that the express exclusion of the court's jurisdiction found in Art. 2638 **C.C.Q.** does not appear to be grounded in either the New York Convention or the Model Law:

> [The New York Convention]
>
> *Article II*
>
> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> [the Model Law]
>
> *Article 7. Definition and form of arbitration agreement*
>
> (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

[69] Thus, the statutory regimes of the two provinces dealing with the interplay between domestic arbitration and court proceedings are inimically different: enacted for different purposes and within different legislative contexts, and substantially differing in their provisions, both in the text of some provisions and in the absence of others. Accordingly, there appear to be three reasons, each standing on its own, why ***Dell*** is inapplicable to the interpretation of the ***CAA*** and in particular s. 15 of that ***Act***.

[70] First, the language of s. 15 of the ***CAA*** is substantially different from that of Art. 940.1 **C.P.P.** Specifically, the former provides for much broader exceptions from the referral of a matter to arbitration under an arbitration agreement. A referral can be refused (by refusing to grant a stay) not only when an arbitration agreement is found to

be void (which is arguably similar to the word “null” used in Art. 940.1 **C.C.P.**), but also when the agreement is found by the court to be inoperative. In ***McKinnon #2***, a five-member panel of our Court of Appeal held that an arbitration agreement becomes inoperative when a court prefers a class action proceeding under s. 4 of the ***CPA***. This conclusion is not affected by ***Dell*** as the meaning of the word inoperative was not addressed by the Court. Thus, the Quebec test elucidated in ***Dell***, on the basis of a provision of the **C.C.P.** dictating that a referral may only be refused if the arbitration agreement is found to be null, is not applicable to s. 15 of the ***CAA*** where referral may be refused when the agreement is inoperative, as that term has been interpreted in ***McKinnon* #2**.

[71] Second, the ***CAA*** does not give an arbitrator the jurisdiction to decide the question of his or her own competence. By the plain language of s. 15 of the ***CAA***, and not displaced by any other sections, that jurisdiction belongs solely to the court. The Quebec test from ***Dell***, the general rule by which an arbitrator must first be given the chance to decide his or her own competence, is expressly authorized by Art. 943 **C.P.P.**, but has no statutory basis in the ***CAA***. This point is further reinforced by the fundamentally different nature of arbitration agreements under the ***CAA*** and the **C.P.P.**, discussed above. Thus, the Quebec test is *prima facie* inapplicable to B.C., the ***CAA***, and ***McKinnon #2***.

[72] Third, the ***CAA***, unlike the ***ICAA***, is not based on the New York Convention and the Model Law. Although it contains a provision with similar exceptions from an otherwise mandatory referral to arbitration, it lacks the jurisdictional provisions discussed above and a legislative directive to be interpreted in accordance with these

international documents. Thus, the Court's decision in ***Dell***, interpreting Quebec's implementation of these international obligations in accordance with the "*prima facie* analysis test that is increasingly gaining acceptance around the word", while possibly informative in regards to interpretation of the ***ICAA***, has no bearing on the interpretation of the purely intra-provincial ***CAA*** statute.

[73] In conclusion, I refer to the following passage from ***Smith Estate,*** ¶237-38, which I believe is applicable to British Columbia:

> 237 In *Dell Computer*, Justice Deschamps, who writes the majority judgment, focuses her remarks exclusively to the *Civil Code of Québec*. There is no mention anywhere in her judgment of *MacKinnon v. National Money Mart Company* 2004 BCCA 473, (2004), 50 B.C.L.R. (3d) 291 (B.C.C.A.); *Smith v. National Money Mart Co.*, [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 528. In their factum and in their material for the motions now before the court, the Defendants make much of the fact that because of the presence of several intervenors from across Canada, the law from across Canada was before the Supreme Court. However, in *Dell Computer*, although the intervenors inundated the Supreme Court with the law from other provinces, the court did not comment and cannot be taken to have ruled on the Ontario legislature's design for the relationship between arbitration agreements and class proceedings, which is, of course, a moving target because the Ontario legislature and the legislatures of the other provinces are free to do something different from Québec.
>
> 238 The Supreme Court did not purport to address the legislative choices of other provinces. Justice Deschamps does not refer to the law in other provinces or to the submissions of the intervenors. The statutory and common law underpinning of the law in other parts of the country is not mentioned, and I do not understand how it can be that Justice Deschamps' judgment can overturn settled case law in those provinces without actually mentioning it. The Defendants, therefore, develop a thesis at a doctrinal level to "effectively overrule" the case law that the Supreme Court does not mention. As I have demonstrated in this section, the doctrine does not prove their thesis.
>
> [Emphasis added]

B. Effect of *Dell* on Telus' Application

[74] As set out above, there are three strong reasons why ***Dell*** is not applicable to the law of British Columbia. However, if I am wrong in this respect, I must consider the effect of ***Dell*** on Telus's application for a stay of proceedings under s. 15 of the ***CAA***. For the two reasons set out below, even if ***Dell*** is applicable to British Columbia law, it does not by necessary implication or effectively overrule ***McKinnon #2***.

[75] The Quebec test, expressed by the Court at ¶84-85, is a "general rule" of systematic referral of challenges to an arbitrator's jurisdiction to the arbitrator and two exceptions for questions of law and questions of mixed fact and law:

> 84 First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
>
> 85 If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
>
> [Emphasis added]

[76] The first conclusion to be drawn from the Quebec test, which indicates that ***Dell*** has no bearing on the instant application, was lucidly explained by Perell J. in ***Smith Estate*** at ¶226:

> 226 The precise point is that the principle drawn from *Dell Computer* and *Rogers Wireless* that a challenge to the arbitrator's jurisdiction or to the validity or applicability or the arbitration agreement should be resolved by the arbitrator is not relevant because the genuine dispute before the court is not about the arbitrator's jurisdiction, which will be subject to the competence-competence principle, but rather the genuine dispute is about the court's jurisdiction to grant a stay, which is a matter of interpreting s. 7 of the *Arbitration Act, 1991*. The conclusion that the invalidity (or not) of the arbitration agreement should be determined at the certification hearing does not offend the "competence-competence" principle because that conclusion is about the court's jurisdiction to stay under the *Arbitration Act, 1991* and the "competence-competence" principle is about the arbitrator's jurisdiction to arbitrate under an arbitration agreement, which is not the same thing.
>
> [Emphasis added]

[77] In other words, where a court certifies a proceeding under s. 4, it effectively loses the jurisdiction to grant a stay under s. 15 because the arbitration agreement is rendered inoperable.

[78] The second such conclusion to be drawn from the Quebec test is that it is subject to two exceptions, namely, when the issue is a question of law or "mixed law and fact [where] … the questions of fact require only superficial consideration of the documentary evidence in the record."

[79] In ***McKinnon #2***, our Court of Appeal established two important principles:

(1) An arbitration agreement is inoperative when a class action proceeding is preferred by the court under s. 4 of the ***CPA***.

(2) The proper sequence of events is for the court to first decide the certification question and then consider the stay application in accordance with the first decision.

[80] Even assuming that the Court in ***Dell*** at ¶82 intended for its directive not to take the word "null" in Art. 940.1 **C.C.P.** literally to mean that it must be interpreted as including the full spectrum of "null and void, inoperative, or incapable or being performed", the Court said nothing about the interpretation or meaning of those distinct categories. Thus, it did not in any way displace the first conclusion from ***McKinnon #2*** with respect to an arbitration agreement becoming inoperative when a class action proceeding is preferred. However, ignoring for the moment the first conclusion to be drawn from the Quebec test discussed above, for the second ***McKinnon #2*** principle to stand in the face of the Quebec test, it must be determined whether the determination that an arbitration agreement is inoperative <u>because a class action proceeding is preferred</u> is a question of law or a question of mixed law and fact which "require[s] only superficial consideration of the documentary evidence in the record."

[81] There can be little doubt that the issue falls under one of these two categories. Fundamentally, the question of certification of a class action proceeding, including the decision whether a class action proceeding is preferred in the face of available and otherwise mandated arbitration, is within the court's exclusive jurisdiction: s. 4 of the ***CPA***. The arbitrator is neither given the legal authority to make such a determination nor possesses the necessary expertise to evaluate the multiplicity of factors listed in s. 4 of the ***CPA***, including such legal issues as whether "the pleadings disclose a cause of action", "whether questions of … law common to the members of the class predominate over any questions affecting only individual members", and "whether the class

proceeding would involve claims that are or have been the subject of any other proceedings". Moreover, this conclusion fits squarely within the Court's analysis of the reasons for this exception, including "the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral": ***Dell***, ¶84. While the decision requires consideration of documentary evidence, it is not evidence that could be properly put before the arbitrator as it goes beyond the parties to the particular arbitration and the scope of the arbitration itself. Thus, it could be said the determination involves only superficial consideration of the documentary evidence in the record before the arbitrator.

[82] Accordingly, the question of whether an arbitration agreement is inoperative because a class action proceeding is preferred falls under the exceptions from the general rule of systematic referral of competency question to arbitrators. ***Dell*** has not by necessary implication or effectively overturned either of the two conclusions from ***McKinnon #2***.

C. Other Issues

[83] Given the above conclusion that ***Dell*** is either not applicable to British Columbia law or does not overturn ***McKinnon #2***, there is no need to determine the issues of issue estoppel, the effect of s. 3 of the ***BPCPA***, and the inapplicability of the arbitration clause prior to 2003 given the absence of any such provision prior to 2003. However, my view is that the plaintiff's arguments on the latter two issues have merit and I note that Telus made no submissions on either point.

V. Conclusion

[84] In the result, the application by Telus for a stay of proceedings is denied.

"The Honourable Mr. Justice Masuhara"

August 13, 2008 – ***Revised Judgment***

Please be advised that the attached Reasons for Judgment of Mr. Justice D. Masuhara dated July 16, 2008 have been edited.

- *On the front page, the name of Counsel for the Applicant should read:*

"S. *Hern*"